

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 428 of 2015

TO

TAX APPEAL NO. 431 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE A.J.DESAI

and

HONOURABLE MR.JUSTICE A.G.URAIZEE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

PRINCIPAL COMMISSIONER OF INCOME TAX 2....Appellant

Versus

GUJARAT GAS FINANCIAL SERVICES LIMITED....Opponent

Appearance:

MR M.R.BHATT, LD.SENIOR ADVOCATE WITH MRS MAUNA M BHATT,
ADVOCATE for the Appellant.

MR S.N.SOPARKAR, LD.SENIOR ADVOCATE WITH MR B S SOPARKAR,
LD.ADVOCATE for the Opponent.

CORAM: **HONOURABLE MR.JUSTICE A.J.DESAI**

and

HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 07/07/2015

**ORAL COMMON JUDGMENT
(PER : HONOURABLE MR.JUSTICE A.J.DESAI)**

1 By way of filing four different tax appeals under Section 260A of the Income Tax Act, 1961, the revenue has challenged the Order dated 5.12.2014, passed by the Income Tax Appellate Tribunal, Ahmedabad as well as the Order dated 15.10.2009 passed by the Assistant Commissioner of Income Tax (Appeals), Ahmedabad, by which the assessment order dated 26.12.2008 passed by the Assistant Commissioner of Income Tax, Circle-IV, Ahmedabad, had disallowed the claim of the respondent assessee company under the provisions of Section-40A of the Income Tax Act.

2 Since all the appeals involve similar facts and questions of law, the same have been taken up for hearing together and disposed of by this common judgment. Since the defence in these group of Appeals is only with regard to the amount disallowed by the revenue authority u/s.40A of the Act, we have considered the Tax Appeal No.428 of 2015 as the lead Appeal in this judgement.

3 The appellant has requested this Court to frame the

following question as substantial question of law in the case for determination of this Court under Section 260A of the Act:

“Whether the Appellate Tribunal has substantially erred in law in deleting the addition of Rs. 7.70 crores made on account of disallowance u/s 40A(2)(b) r.w. S 40A(2)(a) of the Act, without properly appreciating the facts of the case and the material brought on record?”

4 Brief facts emerging from the record are as under:

4.1 The respondent assessee company is a 100% subsidiary company of the Gujarat Gas Company Limited, (hereinafter referred to as “parent company”) owned by the State of Gujarat. The assessee company entered into an agreement with the parent company for providing service, etc to the parent company, which carries the business of supply of gas connection to its customers.

4.2 The assessee company and the parent company had executed an agreement on 25.4.2003 with regard to the service charges. It was agreed that the assessee company has to pay Rs. 3,205/- for each connection. Accordingly, the Assessee company paid Rs.5,82,89,000/- for the assessment year 2004-05 and

Rs. 7,70,28,000/- for the assessment year 2005-06. The said charges were claimed for deduction of tax under Section-37 of the Act. The Assessment Officer allowed the claims made for different Assessment Year in the assessment made under Section-143(3) of the Act.

4.3 The Assessment Officer under the provisions of Section-143 of the Act, issued notice to the assessee for the Assessment Year 2006-07 and called upon to explain certain aspects including the transaction with regard to the service charges between the assessee company and parent company, having found that expenditure claimed by the Assessee company is excessive and unreasonable. The assessee company through its responsible officer appeared before the Assessment Officer and supplied the details as asked for by the the Assessment Officer.

4.4 The Assessment Officer considered the submission of the assessing company with regard to the expenditure unreasonable and held that since the assessing company is using some space of the parent company, the expenditure claimed by the assessee is much on higher side. The officer also held that the office occupied by the assessing company, considering the infrastructure

provided by the parent company to the assessing company, the same can be treated at the rate of Rs.10 lacs per month i.e. Rs. 1.2 crore for an assessment year and, therefore, he deducted the said amount from the total expenditure of Rs. 5, 82,89,335/- and asked the assessee to pay the tax accordingly. The said decision was challenged by the assessee by way of an Appeal No. CIT(A) VIII/AC-4/240/08-09 before the office of the Commissioner of Income Tax (Appeals), Ahmedabad. The Commissioner of Appeals by its Order dated 15.10.2009 allowed the appeal and held that the assessee company is entitled for the expenditure claimed under Section-37 of the Act. The revenue challenged the said decision before the Income Tax Appellate Tribunal, which dismissed the appeal filed by the Revenue by its Order dated 5.12.2015. Hence these appeals.

5 Mr M.R.Bhatt, learned Senior Council, appearing for the appellant, submitted that the Commissioner of Income Tax (Appeals) as well as Tribunal have erred in holding that whatever expenses the assessee has claimed under Section-37 is just and legal since there was an agreement between two parties. He would further submit that the Assessee Company is just using some space

of the parent company and, therefore, the Assessment Officer found that the expenditure claimed by the assessee company towards expenses for each connection, cannot be accepted as market value of the service or facility provided by the parent company. He would submit that under Section 40-A of the Act, the Assessment Officer can refuse the expenditure as a deduction from the income if he finds the same is excessive or unreasonable having regard to fair market value, facility or legitimate needs of the business or provision of the assessee. He would submit that the in response to the notice issued, the assessee company did not provide details about the size of the accommodation provided by the parent company. He would further submit that in absence of any details provided by the assessee company, the assessment officer was right in holding that an amount of Rs.10 lacs per month would be a correct expenditure for occupying some part of the office premise belongs to the parent company. He would also submit that principle of res judicata does not apply to the income tax proceedings as each assessment year is considered as a separate unit and, therefore, though, in earlier assessment years, the service charges were accepted for deduction from income tax cannot preclude the revenue for disallowing the same in the

subsequent assessment year. He, therefore, would submit that the appeal requires consideration.

6 On the other hand, Senior Counsel Mr. Soparkar, for the respondent, has vehemently opposed, even admission of these appeals. He would submit that the assessee company as well as parent company are government companies and each of the company pays the tax at maximum marginal rate. He would further submit that it is not the case of the revenue that the assessee has tried to evade any tax liability. He would further submit that the assessee and the parent company have agreed to enter into a contract, by which it was agreed that the assessee company has to pay Rs.3,205/- towards service charges which was accepted by the department itself for the last two consecutive years and, therefore, there was no reason for the assessment officer to disallow the claim made by the petitioner by exercising power under Section 400-A of the Act. By taking us through the observations made in the order of the Commissioner of the Income Tax (Appeals) as well as the Tribunal, he would submit that both the lower authorities have dealt with the case in detail and have rightly passed the order, which does not call for any interference

under Section 260A of the Act. He would submit that the specific contention was raised by the assessee before the Assessment Officer about the contractual relationship between the parties and, therefore, in absence of any cogent evidence or material, the Assessment Officer could not have fixed or assessed the case as if the same relates only for the accommodation and infrastructure provided by the parent company. As far as deduction under Section-37 of the Act is concerned, he would submit that under Section 40-A (2A) if the Assessing Officer is of the opinion that the expenditure is on excessive or unreasonable, before coming to the amount for deductible under Section-37, he should have gathered some material and compared the same with the case of the assesses before fixing the amount deductible i.e. Rs.10 lacs per month.

7 By relying on the decision in case of the **Commissioner of Income Tax-III vs Ashok J Patel, as reported at (2014) 43 Taxmann. com 227 (Gujarat)**, he would submit that the Assessing Officer has to ascertain the fair market price of such goods and facilities and before giving the verdict, the assessee must have an opportunity of explaining the same, which is not the case on hand.

He has also placed reliance in the case of **Commissioner of Income Tax-I vs Enviro Control Associated (P) Ltd.**, as reported at (2014) 43 Taxmann.com 291 (Gujarat) and would submit that the Assessing Officer has to ascertain the fair market price of such goods before deciding the correct amount. The assessee must have an opportunity of hearing, which is not given in the present case. He would submit that since the assessee company and the parent company are paying tax at the maximum marginal rate, there was no question of evading the payment of tax and, therefore, there is no need to exercise the power under Section 40A of the Act. In support of the case, he has relied on a decision of this Court in the case of **Commissioner of Income Tax-I vs. Enviro Control Associated (P) Ltd.**, as reported at (2014) 43 Taxmann.com. 227 and submitted that since the assessee company as well as the parent company are paying the tax at maximum marginal rate, the entire exercise undertaken by the Assessment Officer is viewed, since it is a neutral exercise as far as the payment of tax is concerned and there is no question of evading payment of tax by any of the two companies. He would further submit that in the previous year, the expenditure with regard to service charges at Rs.3205/- per connection was accepted and there was no reason for

the Assessment Officer to change his opinion. He has relied upon a decision of this Court in the case of **Commissioner of Income Tax vs Excel Industries Ltd, as reported at (2013) 358 ITR 295 (SC)** and submitted that such practice adopted by the Assessment Officer is required to be deprecated.

8 By relying upon a decision of the Bombay High Court in the case of **Commissioner Of Income Tax vs Indo Saudi Services (Travel) P. Ltd. as reported as (2009) 310 ITR 306 (Bom)**, he would submit that the Central Board of Direct Taxes had issued a Certificate Non.6-P dated July 6, 1968, which debars the Assessment Officer from not allowing such payments made to the relative and sister concern where there is no attempt to evade the tax.

9 He, therefore, would submit that the appeals are meritless and the same are required to be dismissed in limine.

10 We have heard learned Advocates appearing for the parties.

11 It would thus be clear from the above observations of the Hon'ble Supreme Court that the principle of res judicata does

not apply to income tax proceedings and each assessment year is considered as a separate unit. Still, however, the Hon'ble Supreme Court has held that in absence of any material or substantial change justifying the revenue to take a different view than the view it had taken in the preceding assessment years, it should not have reopened the issue in the subsequent assessment year. In the case on hand also, there cannot be any avil that, strictly speaking, the principle of res judicata is applicable to income tax proceedings. Still, however, the revenue had allowed deduction of service charges from the income to assess the income tax of the respondent in the preceding year. In absence of any material change, it could not have disallowed the claim of service charges under Section-40(A) of the Act. In the backdrop of these facts, the arguments canvassed by learned Senior Counsel Mr. M.R. Bhatt cannot be countenanced.

12 The Gujarat Gas Financial Services Limited (a Government Company), is engaged in distributing gas through pipelines to its customers, wherein the respondent company is 100% subsidiary company of the Gujarat Gas Company Ltd. It is accepted fact that the parent as well as assessee company had

entered into an agreement on 25.4.2003 for various works, which are to be undertaken by the assessee company. For such works, the assessee company would be entitled for service charges and the charges agreed between the parties is Rs. 3,205/- per connection. Accordingly, for the assessment year 2004-2005, the assessee company had paid Rs. 5,00,84,000/- towards service charges. which was deducted by the Assessment Officer under the provisions of Section 37 of the Act. Similar is the case for assessment year 2005-06 to the tune of Rs.7,07,00,028/-. The Assessment Officer, who found such amount as excessive for the assessment Year 2006-07, initiated proceedings by exercising powers under Section 40A(2) of the Act. It was the case of the assessee company that it is the company which is providing various kinds of services to the parents company and both the companies are paying the highest tax and, therefore, there was no evasion of tax by the assessee. The Assessment Officer could not accept the submissions made by the company that in past two years the claim made towards the expenditure was accepted by the Officer on the ground that there is no question of res judicata, however, has held that without any material, the maximum expenditure of the assessee company towards service charges is Rs.10 crores as, if, the assessee company

was only received the premiums belong to the foreign company, which is contrary to law laid down by the various courts and tribunals. As far as this aspect is concerned, the Hon'ble Apex Court in the case of **Commissioner of Income Tax vs Excel Industries Ltd, as reported at 295 ITR** has held in paragraphs 28, 29, 30 and 31 which reads as under:

“28 Secondly, as noted by the Tribunal, a consistent view has been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee. Consequently, there is no reason for us to take a different view unless there are very convincing reasons, none of which have been pointed out by the learned counsel for the revenue.

*29 In Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC) this court did not think it appropriate to allow the reconsideration of an issue for a subsequent assessment year if the same “fundamental aspect” permeates in different assessment years. In arriving at this conclusion, this court referred to an interesting passage from **Hoystead v. Commissioner of Taxation (1926) AC 155 (PC)** wherein it was said (page 328 of 193 ITR):*

“Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end,

except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle – namely, that of a setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it maybe true enough that subsequent light or ingenuity might suggest some traverse which had not been taken.”

- 30 Reference was also made to *Parashuram Pottery Works Co. Ltd vs ITO*(1977) 106 ITR 1 (SC) and then it was held (page 329 of 193 ITR):

“We are aware of the fact that strictly speaking *res judicata* does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter – and if there was no change, it was in support of the assessee - we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand

should have been taken.

31 *It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers money in pursuing litigation for the sake of it."*

13 As has been found by us in the preceding para of this judgment that the respondent company as well as the parent company, both are assessed to income tax at the maximum marginal rate and, therefore it cannot be said that the service charge is paid to the respondent company at a unreasonable rate to evade income tax. Even the learned Counsel Mr. Bhatt for the revenue does not dispute this fact.

14 We are in agreement with the observations made by the Tribunal as well as the ratio laid down by the coordinate Bench of this Court in the case of (1) **Commissioner of Income Tax-I vs Enviro Control Associated (P) Ltd.**, as reported at (2014) 43 Taxmann.com 291 (Gujarat); (2) **Commissioner of**

Income Tax-III vs Ashok J Patel, as reported at (2014) 43 Taxmann. com 227 (Gujarat) and (3) Commissioner Of Income Tax vs Indo Saudi Services (Travel) P. Ltd. as reported as (2009) 310 ITR 306 (Bom).

15 It is pertinent to note that so far as the Circular dated 6.7.1968 is concerned, it makes clear that the provisions under Section 40A (2) and particularly with regard to the transaction between the relatives and associates is concerned, the same shall be treated as bona fide case unless the officer finds it that one of them is trying to evade payment of tax.

16 Considering the overall facts of the case and the ratio laid down by the Hon'ble Apex Court, we are of the opinion that the appeals are meritless and the same deserve to be dismissed and accordingly dismissed.

(A.J.DESAI, J.)

(A.G.URAIZEE,J)

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